

## **REMARKS/ARGUMENTS**

Claims 11,12,14,15 are currently pending.

The July 9, 2008 Office Action indicated that claims 11, 12, 14 and 15 are rejected under §103(a) as being unpatentable over U.S. Patent 6,718,738 to Huseman.

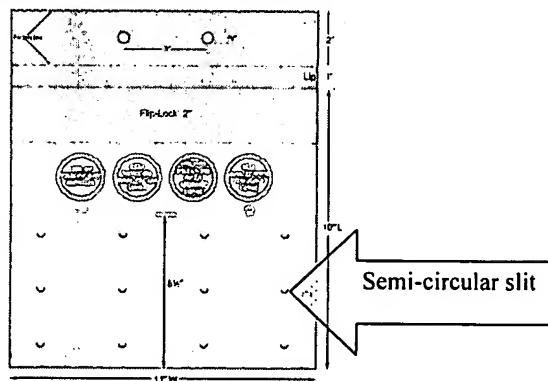
By this amendment, the independent claims are amended, and two new dependant claims are added to further describe the novel elements of the present invention.

Support for the amendments to the independent claims is found ¶14 of the published application wherein the configuration of the vents is discussed. Specifically, that paragraph includes the discussion that “vents permit vapor to escape the bag during heating so that the pressure within the bag does not rise to an excessive level.” Integral to this teaching is that the vents must also be closed at some point, such as during freezing as the current claims indicate.

Support for the additional limitations of the dependant claims are found in ¶14 of the published application wherein it is stated that the “vents preferably consist of multiple semi-circular slits cut into the front and rear walls of the bag.” In regards to the additional dependant claims, the same paragraph indicates that while the exact shape of the slits may vary, the bag should contain slits. Further, the drawings attached to the application depict slits as opposed to other venting means, such as holes.

### **Summary of Applicant's Invention**

Applicant's invention comprises a food storage bag which facilitates both heating and freezing of the contents of the bag *in situ*. The invention consists of a series of vents in the main body of the bag (see below).



During freezing, the vents are closed such that the food held within the bags neither becomes dehydrated, nor comes in contact with frost. When the bag and its contents are heated, the vents open allowing heated air to escape, while allowing a minimal amount of the external atmosphere to enter the bag.

### **§103(a) Rejection over Huseman**

Claims 11, 12, 14 and 15 are rejected under §103(a) as being unpatentable over U.S. Patent 6,718,738 to Huseman. Specifically, the Examiner indicated that "using any suitable vent shape as taught by Huseman would perform equally well."

Applicant respectfully disagrees that the holes used by Huseman would perform the same function as to the vents used by the current application. Instead, Applicant submits that the holes used by Huseman when combined with the remaining elements of the present invention would create a combination unsuitable for its purpose (See attached affidavit).

Courts have held that product shape choices are non-obvious in certain circumstances. For example, in comparing the shapes of holes in tape, a court of appeals held that the use of holes of particular shape was patentable. See *United States Gypsum Co. v. National Gypsum Co.*, 440 F.2d 510, 511 (7th Cir. Ill. 1971) ("[n]one of the prior art patents ... suggested the use of tape with perforations of a size which would permit the escape of air but prevent the escape of adhesive"). In finding the tape non-obvious, the court found that the cited prior art, which used holes of a different size, did not achieve the same benefits. *Id.*

The present invention uses slits as vents and, as new dependent claims state, the bags also exclude other vents, such as the holes in Huseman. As the enclosed affidavit explains, the use of vents is important in that it allows the bags of the instant invention to be taken from the freezer to the heater and this benefit is not enjoyed by other bag designs.

In contrast, holes are the sole means of venting discussed by Huseman. If Huseman's holes were introduced to the design of the present invention, the contents of the bags could *neither* be heated nor could the contents be frozen without detrimental

effect to the food in the bag. Holes in the bag would result in high through-put for the air flow through the bag. Such holes would also prevent the bags from functioning for their intended purpose.

Specifically, holes would result in dehydration of the food during freezing as well as contamination of the food during heating. Therefore, while holes are acceptable in some circumstances, such as for the transport of fresh produce, they would prevent freezing and heating of the contents of the bag. Given that the stated purpose of the present invention is to facilitate this freezing and heating, the venting holes of Huseman do not serve the same purpose.

Furthermore, as the attached affidavit discusses, it is easier to manufacture bags with holes instead of slits. It is a simple matter to punch holes through the film, but cutting slits requires calibrated tools and additional quality control steps to be undertaken during the manufacturing process.

#### Commercial Success

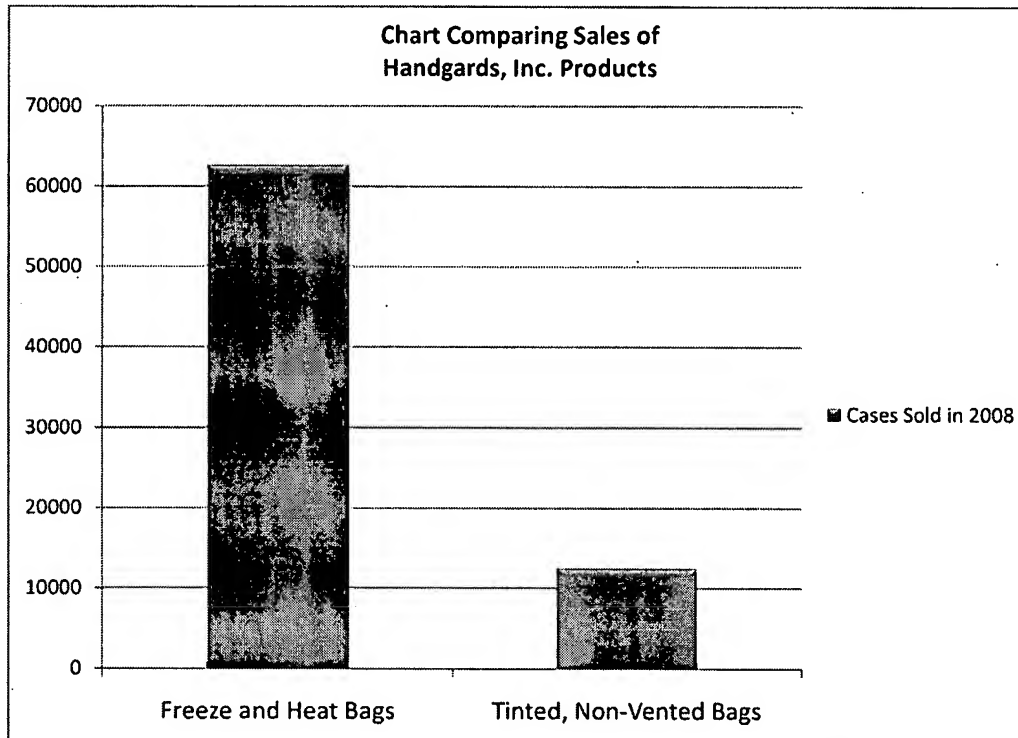
While there had been a need for food storage bags that can be used in both a freezer and then subsequently heated, prior to the applicants developing this product; no bags on the market could be used in this way. The research and development efforts of the assignee of the present invention, Handgards, Inc., resulted in a bag that has enjoyed considerable commercial success because of the ability of the bag to be moved from freezing to heating. In other words, the success of the bag was the result of the novel features as presently claimed.

The objective evidence of these secondary considerations further demonstrates that the present invention is a non-obvious improvement over the prior art which uses holes. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966) and *Arkie Lures, Inc. v. Gene Larew Tackle, Inc.*, 119 F.3d 953, 957 (Fed. Cir. 1997) (commercial success of invention contributed to finding of non-obviousness). The prior art does not teach the use of slits and therefore the prior art bags could not be used in the same circumstances as the instant invention.

As the attached affidavit discusses, Handgards Inc. manufactures a number of food handling products, including different types of food storage bags. Most relevant to the instant application are two bags: a vented freeze and heat bag (i.e. the instant

invention) and a "standard" tinted bag. These two products share the same market and receive comparable amounts of marketing expenses.

The vented freeze and heat bags enjoy commercial success that the unvented bags do not. Sales volume for 2008 is depicted in Chart 1, reproduced below.



\* Advertising Dollars/Unit of Product the substantially the same for each of the above Handgards products

\* Time Period/Product cycle the same for each of the above Handgards products

The 2008 sales volume for the vented freeze and heat bags is 63,600 cases. The 2008 sales volume of the tinted, non-vented bags is only 12,450 cases. The sole substantive difference between the two bags is that the tinted, non-vented bags do not have the semi-circular vents used in the instant invention.

Applicants hereby request that a Telephonic Examiner's Interview be arranged after the Examiner has had an opportunity to review the current Office Action Response.

An earnest attempt has been made hereby to respond to the July 9, 2008 Official Action. Applicant submits that the amendments have put the application in a condition

In re McLellan (SN 10/796,725)  
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ready for allowance. Accordingly, Applicant respectfully requests that the Examiner issue a Notice of Allowance in this application.

Respectfully submitted,  
**CHERSKOV & FLAYNIK**

Date: November 10, 2008

/Szymon M. Gurda/

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